AWARD NO. 15
DOCKET NO.15
ORT CASE NO. 3593

SPECIAL BOARD OF ADJUSTMENT NO. 506

THE ORDER OF RAILROAD TELEGRAPHERS
vs.
MISSOURI PACIFIC RAILROAD COMPANY
Roy R. Ray, Referee

STATEMENT OF CLAIM:

"Claim of the General Committee of The Order of Railroad Telegraphers on the Missouri Pacific Railroad (Gulf District) that:

Claim No. 1

1. Carrier violated Vacation Agreement on June 19, 1961, when it canceled C. W. Plummer's scheduled vacation beginning June 22, 1961.

2. Carrier shall compensate C. W. Plummer an additional eight (8) hours at time and one-half rate for each day, June 22, 1961 through and including July 10, 1961, his scheduled vacation.

Claim No. 2

1. Carrier violated Vacation Agreement on July 5, 1961, when it cancelled W. F. Bradley's vacation beginning July 11, 1961.

2. Carrier shall compensate W. F. Bradley an additional eight (8) hours at time and one-half rate for each day, July 11, 1961 through and including July 22, 1961, his scheduled vacation."

OPINION OF BOARD:

Claimant Plummer, a regular telegrapher in the Palestine, Texas, Relay Office had been assigned a vacation period from June 22 to July 10, 1961. On June 19th, three days before it was to begin, he was notified by Carrier that his vacation would be postponed because no vacation relief was available to relieve him. Claimant Plummer worked the entire period of his scheduled vacation. He was later assigned another vacation period beginning August 4, 1961, which he took.

Claimant Bradley, a regular telegrapher in the Palestine, Texas, Relay Office had been assigned a vacation period from July 11 to July 22, 1961. On July 5th, six days before it was to begin, he was notified by Carrier that his vacation would be postponed because no qualified operator was available to relieve him. Claimant Bradley was later assigned another vacation period beginning July 18, 1961, which he took.

In each case claim was made for compensation at the time and one-half rate for each day of the scheduled vacation. Employes contend that Carrier violated Article V of the Vacation Agreement (1941) as amended by Article I, Section 4 of the 1954 Agreement when it deferred the vacation of Claimants without giving them

the required ten (10) days' notice. These provisions are set forth in the submissions and it is not necessary to repeat them there. Under Article V Carrier is authorized to defer vacations but must give at least 10 days' notice unless emergency conditions prevent.

Carrier contends that the shortage of extra telegraphers to fill the positions of Claimants at the time of the scheduled vacations constituted emergency conditions relieving Carrier of its obligation to give the 10 days' notice.

The chief issue before the Board is whether the situations which existed at the times in question can be classed as emergency conditions. In its submission Carrier says that arrangements had been made for Extra Telegrapher Davidson to relieve Claimants during their scheduled vacations. But that on June 19th and again on July 5th, he was called into the Dispatcher's office to provide relief there and thus was unavailable to relieve Plummer on June 22nd and Bradley on July 11th; that since Carrier had no one else available to relieve Claimants it had no choice but to postpone their vacations, Carrier claims that it normally has two extra telegraphers to perform relief service at Palestine.

Although not mentioned in the handling on the property, at the hearing before the Board Carrier stated that the other extra employe it had counted upon for relief was Mrs. Russell. But that on June 14 she was permitted to fill a vacancy on the line leaving only Davidson available, that on June 19 when he was called to Dispatcher's Office to provide relief there, the Superintendent of Communications tried to get Mrs. Russell back but was unable to do so. As to Claim No. 2, Carrier said it tried to get Mrs. Russell back to relieve Bradley but could not do so. It then arranged to have Telegrapher Slay relieve Bradley but on July 5 he became ill and Carrier had no other employe available.

Under Carrier's own admission the only relief it had planned to protect vacations of the two Claimants were Russell and Davidson. At the hearing it was brought out that Mrs. Russell could not be relied upon since she was called upon frequently to protect other assignments. In our view the situation which arose cannot be classed as an emergency. It was not an unforeseeable combination of circumstances. With only two extra telegraphers in sight to protect these vacations, one or both of whom was subject to call to protect other positions, Carrier should certainly have realized that this was an inadequate force at the time of year when there is a heavy vacation schedule.

In two recent awards the Third Division has held that the shortage of extra telegraphers for vacation relief does not constitute an emergency. Awards 10839 and 10919. These awards on similar fact situations are persuasive here. We hold therefore that Carrier violated the Agreement in deferring the vacations of Claimants without proper notice.

As to the matter of compensation, Carrier argues that Claimants are not entitled to any compensation beyond what they have already received. It contends that Section 4 of the 1954 Amendment to Vacation Agreement does not apply because Claimants were later given vacations. We reject this line of reasoning as unsound. In this connection we quote from Award 10839 of the Third Division on the same point:

"If this line of reasoning were accepted, we would have a wrong without a remedy. If Carrier can postpone an employe's scheduled vacation at will without any proper notice where no emergency exists without incurring any liability and force employe to take his vacation at some later time, Article 5 would be meaningless and the employe would have no security whatever in his assigned vacation. In our view this is contrary to the spirit as well as the language of the Agreement."

In the instant case Carrier has deferred Claimant's vacations without adequate notice and it becomes obligated to compensate them for the vacations at the regular rate and to pay them at the time and one-half rate for the periods they worked during their scheduled vacations. Since Claimant Plummer worked the entire period, he is to be paid for all of it. Since Claimant Bradley worked only a week of his scheduled vacation, his compensation is to be limited to this period.

FINDINGS: That the Agreement was violated.

AWARD

Claims sustained to the extent indicated in the Opinion.

SPECIAL BOARD OF ADJUSTMENT NO. 506

/s/ Roy R. Ray
Roy R. Ray - Chairman

/s/ D. A. Bobo
D. A. Bobo - Employe Member

/s/ G. W. Johnson
G. W. Johnson-Carrier Member

Dissent Attached

St. Louis, Missouri
August 20, 1963
File 279-195
279-199

SBA 506-AWD 15

CARRIER MEMBER'S DISSENT TO AWARD NO. 15
SPECIAL BOARD OF ADJUSTMENT NO. 506
(O.R.T. versus Mo.Pac.RR)

Award No. 15 is in error because the majority

1. Disregarded the facts in concluding that no emergency conditions existed, and

2. Exceeded its authority by assessing a penalty not provided for in the effective Agreement.

1. The facts of record show that vacations were duly scheduled for Claimants Plummer and Bradley, and that extra telegraphers were available to relieve the claimants for vacations as scheduled until June 19, 1961, in "Claim No. 1," and until July 5, 1961, in "Claim No. 2." On those dates the two extra telegraphers relied upon by the Carrier to relieve the claimants for vacations became unavailable by reason of their exercise of seniority to other prior vacancies or by reason of illness. In view of the needs of the service, claimants' positions could not be blanked during the period for which their vacations had been scheduled, and they were notified of the deferment of their vacations on June 19, 1961, and on July 5, 1961, respectively.

Both claimants were compensated at the pro rata rate for days worked during the period for which vacations were originally scheduled. Vacations for both claimants were rescheduled promptly and Claimant Plummer took his vacation beginning August 4, 1961, and Claimant Bradley took his vacation beginning July 18, 1961, and both were compensated at the pro rata rate while on vacation.

Article 5 of the Vacation Agreement of 1941 provides, in part, as follows:

" *** the management shall have the right to defer (vacations) provided the employee so affected is given as much advance notice as possible; not less than ten (10) days' notice shall be given except when emergency conditions prevent."

The Carrier recognizes that the purpose and intent of the Vacation Agreement is to provide vacations with pay to employes who qualify therefor, and the Third Division of the National Railroad Adjustment Board has so held. See Award No. 10958 (Dolnick) which held that -

" *** It is a fundamental principle that the purpose of the Vacation Agreement is to provide time off, not pay. ***** If an employe is unwilling to co-operate and agree on a vacation date, it is the duty of the Carrier to set the vacation period within the year when it is earned. *******."

When emergency conditions arose less than ten (10) days prior to date vacations were scheduled to begin, the Carrier gave as much notice as possible of the deferment, and promptly rescheduled them, at which time relief workers were available, and the claimants were accorded vacations with pay. Thus, the Carrier complied with the intent, purpose and language of the Vacation Agreement; particularly Article 5 thereof; but for doing so it has been found by the majority to be in violation of the Vacation Agreement!!

During the hearings before the Board copies of Award No. 17, Special Board of Adjustment No. 305 (O.R.T. vs Mo.Pac.), Referee McMahon, and Award No. 22, Special Board of Adjustment No. 166 (BRC vs Mo.Pac.), Referee L. Smith, were made available to the Board. Both of these awards denied claims for additional compensation in behalf of claimants whose vacations had been deferred with less than ten (10) days' notice on the grounds of emergency occasioned by the illness of the extra employes relied upon by the Carrier to relieve the vacationing employes there involved. In those cases, as here, vacations were rescheduled, which the employes took with pay.

To the same effect, see Third Division (Supp.) Awards Nos. 10357 (Referee Schedler), and 10965 (Referee Dorsey), and Third Division Award No. 10958 (Referee Dolnick).

2. After having erroneously concluded no emergency conditions existed, the majority was then unable to find a rule in any Agreement between the parties which would support claims for additional compensation at the punitive rate of time and one-half for days worked (for which they were compensated at the pro rata rate) during the period for which vacations were originally scheduled; it being undisputed that both claimants took their rescheduled vacations with pay, and without protest.

On page 1 of this Dissent we quoted a portion of Article 5 of the Vacation Agreement of 1941 with respect to the right of the Carrier to defer vacations. The last paragraph reads as follows:

> "If a carrier finds that it cannot release an employee for a vacation during the calendar year because of the requirements of the service, then such employee shall be paid in lieu of the vacation the allowance hereinafter provided."

The "allowance hereinafter provided," referred to in Article 5, is found in Article 7 of said Agreement. Article 5 of the Vacation Agreement of 1941 was amended by Article I, Section 4 of the National Non-Op Agreement of August 21, 1954, as follows:

> "Effective January 1, 1955, Article 5 of the Vacation Agreement of December 17, 1941 is hereby amended by adding the following:
>
> > Such employee shall be paid the time and one-half rate for work performed during his vacation period in addition to his regular vacation pay."

The application of the language of amending Article I, Section 4, quoted above, has been interpreted by Third Division Award No. 8282 (Referee Lynch) as follows:

> "It is perfectly clear that 'such employe', referred to in the quoted amendment means the employe Carrier was unable to release at any time during the year for vacation because of the requirements of the service." (Emphasis supplied.)

The same language of the 1954 Amendment was again interpreted by Third Division Award No. 9228 (Referee Rose) as follows:

> "*** The sole question presented is whether the provisions of the Amendment quoted above entitle Claimant to the time and one-half rate because his vacation period, originally scheduled to begin on June 13, 1955, was deferred to the month of September, 1955.

"The answer to this question must be in the negative. It is entirely clear that the words 'such employe' in the Amendment mean 'an employe' who cannot be released by the Carrier 'for a vacation during the calendar year because of the requirements of the service' as stated in Article 5. (Award 8282.)"

Again, Third Division Award No. 7820 (Referee Smith), as follows:

"Article 5 of the National Vacation Agreement covers two existing conditions, namely, when vacations are taken and when they are not taken. The sole penalty provided when employes are not permitted to take their vacation is payment in lieu thereof. Claimant here was so compensated." (Emphasis supplied.)

It is abundantly clear from the awards cited and quoted in part above that the penalty provided by the parties in negotiated agreements applies only to those employes the Carrier is unable to release for vacations during the calendar year, and to no other. Since the claimants here WERE released for vacations during the calendar year 1961, which both took without protest and with pay, there can be no Agreement support for the award of the majority here.

Special Board of Adjustment No. 506 was established by Agreement between the Mo. Pac. RR Company and the O.R.T., dated April 10, 1963, paragraph H of which reads as follows:

"The Board shall not have jurisdiction of disputes growing out of request for change in rates of pay, rules and working conditions, and shall not have authority to change existing agreements governing rates of pay, rules and working conditions."

The foregoing language specifically prohibits the changing of existing Agreements or the writing of new rules under the guise of interpretation, administering equity, or otherwise. The authority of this Board is limited by Agreement to interpreting existing Agreements. As has been seen, the language of Article 5 of the Vacation Agreement of December 17, 1941, as amended by Article I, Section 4 of the National Non-Op Agreement of August 21, 1954, does not and cannot support an interpretation which extends the specific penalty provided for therein to include employes who are released for a vacation during the calendar year, with pay. Awards Nos. 8282 (Lynch), 9228 (Rose), 7820 (Smith), have refused to extend the penalty in Article 5 as has been done here.

While some awards of the Third Division, National Railroad Adjustment Board, have assessed penalties where none is provided in applicable Agreements, there is no authority for doing so to be found in its creator, the Railway Labor Act, and numerous awards of all Divisions of the N.R.A.B. have so held!

Third Division Award No. 10511 held to this effect in the following language:

"**** It is not the function of the Board, however, to indiscriminately assess punitive damages where no fraud, no discrimination or no malice is shown in the record and where no employe, whether it be the proper Claimant or not, had suffered or may have suffered any damages by reason of such alleged violation.

"It is a fundamental principle of law that damages for a breach of contract is the amount which the Claimant actually suffered by reason of such a breach. *****."

As stated in Third Division Award No. 8673 -

"Punitive damages are not ordinarily approved by the Board."

To the same effect see Awards Nos. 3651 (Miller), 5186 (Boyd), 7309(Rader) and 8674 (Vokoun).

Again, in Award No. 10963, Third Division, (Referee Dorsey), the Board, in refusing to assess penalty, held as follows:

> "* * * Therefore, for this Board to make an Award as prayed for in Parts (2) and (3) of the Claim would be imposing a penalty on the Carrier and giving the MW Employes a windfall --neither of such results is provided for or contemplated by the terms of the contract. To make such an Award, we find, would be beyond the jurisdiction of this Board."

Once more, in Third Division Award No. 7309, the Board held:

> "*** The assessing of the penalty claim would be an extremely drastic measure to be invoked and one of doubtful legality under the rules of the Agreement, as no specific rule can be used as a basis for such an award."

Finally, in Third Division (Supplemental) Award No. 10965 (Referee Dorsey) the Board held, in a case similar to the instant dispute:

> "The Claim must be denied for still another reason. Claimant did, without protest, take his vacation as reassigned and was paid in accordance with the terms of the Agreement. While Claimant may have been inconvenienced by the deferment, he suffered no loss of wages. The Agreement does not provide for compensatory damages for inconvenience."

In any event, as we have seen, the creators of Board No. 506 specifically provided by Agreement that it "shall not have authority to change existing Agreements governing rates of pay, rules and working conditions." Yet that is the effect of this Award No. 15, if it is to be regarded as a precedent. All this to the injury of one party, the Missouri Pacific Railroad Company, to the unjust enrichment of the claimants, and to the injury of other employes who desire a vacation with pay, even if their duly scheduled vacations must be deferred with less than ten (10) days' notice, as here, in order to accomplish that result.

For these reasons, I dissent.

/s/ G. W. Johnson
G. W. Johnson - Carrier Member

St. Louis, Missouri
September 5, 1963